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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

MATTHEW COBBS,

Defendant and Appellant.

F078187

(Super. Ct. No. 15CR-00701)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Merced County. Ronald W. Hansen, Judge. (Retired Judge of the Merced Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.)

Richard L. Fitzer, under appointment by the Court of Appeal, for Defendant and Appellant.

Office of the State Attorney General, Sacramento, California, for Plaintiff and Respondent.

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* Before Detjen, Acting P.J., Peña, J. and DeSantos, J.

Appellant Matthew Cobbs appeals from the sentence imposed following a remand for resentencing by this court.¹ Following independent review of the record pursuant to *People v. Wende* (1979) 25 Cal.3d 436, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On February 16, 2015, as Austin Davis and Jesse Wisdom sat on their motorcycles in a residential driveway in Atwater, Cobbs walked up to Davis and fired four shots, striking Davis in the shoulder.

On April 7, 2016, Cobbs entered enter a plea in this matter in exchange for a sentence between 12 years 8 months and 15 years 8 months. Pursuant to his negotiated plea, Cobbs pled no contest to two counts of assault with a semiautomatic firearm (counts 3 & 4/Pen. Code, § 245, subd. (b)),² and possession of a firearm by a felon (count 5/§ 29800, subd. (a)(1)). He also admitted a personal use of a firearm enhancement (§ 12022.5, subd. (a)) in counts 3 and 4 and a prior prison term enhancement (§ 667.5, subd. (b)).

On May 6, 2016, the court sentenced Cobbs to an aggregate 15-year prison term: the midterm of six years on count 3, the midterm of four years on the firearm enhancement in that count, a two-year term on count 4, the mitigated term of three years on the firearm enhancement in that count, a concurrent three-year term on count 5, and a concurrent one-year prior prison term enhancement. The court also awarded Cobbs 511 days of presentence custody credit consisting of 445 days of actual custody credit and 66 days of conduct credit.

Following a timely appeal, on September 20, 2017, this court issued an unpublished opinion in which we concluded that the trial court erred by imposing a full-

¹ Cobbs's request for judicial notice of this court's unpublished opinion in case No. F073842 is granted. (*People v. Cobbs* (Sept. 20, 2017, F073842) [nonpub. opn.])

² All further statutory references are to the Penal Code.

term firearm use enhancement on count 4 and a concurrent prior prison term enhancement. We also remanded the matter for resentencing.

On January 12, 2018, the court resentenced Cobbs to an aggregate 15-year term as follows: the upper term of nine years on his assault conviction in count 3, a three-year arming enhancement in that count, a two-year term on his assault conviction in count 4 (one-third the middle term of three years), a one-year arming enhancement in that count (one-third the low term of three years), and a stayed three-year term on his possession of a firearm conviction in count 5. The court also struck the prior prison term enhancement and it awarded Cobbs 1,060 days of actual custody credit and 159 days of local conduct credit for a total of 1,219 days of presentence custody credit.

Cobbs's appellate counsel has filed a brief that summarizes the facts, with citations to the record, raises no issues, and asks this court to independently review the record. (*People v. Wende, supra*, 25 Cal.3d 436.) However, in a letter filed on December 28, 2018, Cobbs asks us to consider whether it was unfair for the court to resentence him to the upper term on count 3 when it originally sentenced him to the midterm on that count. He also asks that the matter be remanded to the trial court for it to consider whether to strike his firearm enhancements pursuant to Senate Bill No. 620 (2017-2018 Reg. Sess.) (Senate Bill 620).³

“Upon remand for resentencing ... the trial court has jurisdiction to modify every aspect of the defendant's sentence on the counts that were affirmed, including the term imposed as the principal term.” (*People v. Burbine* (2003) 106 Cal.App.4th 1250, 1259.) However, the aggregate sentence cannot be increased. (*Id.* at pp. 1256, 1258–1259.)

³ In October 2017, the Governor signed into law Senate Bill 620, effective January 1, 2018, which provides the trial court discretion to strike gun use enhancements imposed pursuant to sections 12022.5 and 12022.53 (amending §§ 12022.5, subd. (c) & 12022.53, subd. (h).) (Stats. 2017, ch. 682, §§ 1, 2.) At Cobbs's resentencing hearing, the court denied defense counsel's request to strike the firearm enhancements it imposed.

Thus, the trial court acted within its jurisdiction when it resentenced Cobbs to a 15-year term even though the term imposed on count 3 increased from a middle term of six years to an upper term of nine years.

Further, we decline to remand for the trial court to consider striking the gun use enhancements it imposed because the court already considered striking them and declined to do so.

However, our review of the record disclosed the court erred by awarding Cobbs presentence conduct credit for the days he was in custody from the date of his original sentencing to the date of his resentencing.

“[W]hen a prison term already in progress is modified as the result of an appellate sentence remand, the sentencing court must recalculate and credit against the modified sentence all actual time the defendant has already served, whether in jail or prison, and whether before or since he was originally committed and delivered to prison custody.” (*People v. Buckhalter* (2001) 26 Cal.4th 20, 29, italics omitted.) Further, since the accrual of credit to shorten a prison inmate’s period of incarceration is governed by the procedures established and administered by the Director of Corrections (*id.* at pp. 30–31), it was the responsibility of the Director of Corrections, and not the trial court, to calculate such credit. Thus, the court erred when it purported to calculate Cobbs’s entitlement to conduct credit for the time he served in prison custody and increased his local conduct credit from 66 days to 159 days.

Additionally, our review of the record disclosed the following errors: (1) Cobbs is entitled to 1,061 days of actual custody credit instead of 1,060; (2) section 1 of Cobbs’s abstract of judgment indicates the court imposed a concurrent, rather than a stayed term on his conviction for being a felon in possession of a firearm; and (3) section 15 of the abstract indicates that execution of the sentence was imposed at the initial sentencing

hearing rather than at a resentencing hearing pursuant to a decision on appeal. We will direct the court to correct the errors discussed above.

Following an independent review of the record, we find that no further reasonably arguable factual or legal issues exist.

DISPOSITION

The trial court is directed to file an amended abstract of judgment that contains the following modifications: (1) in section 1, the abstract should indicate that the court imposed a stayed term on Cobbs's conviction for being a felon in possession of a firearm; (2) in section 15, it should indicate that execution of sentencing was imposed "at resentencing per decision on appeal"; and (3) in section 16, the abstract should indicate that Cobbs earned total credits of 1,127 days consisting of 1,061 of actual custody credit and 66 days of local conduct credits. The trial court is further directed to forward a certified copy of the amended abstract of judgment to the appropriate authorities. In all other respects, the judgment is affirmed.